

**Consideration of recommendation for preliminary adoption of a rule (or development of a rule) to provide for review of testing results and review of continuing education;
Administrative Cause No. 11-189A**

For a growing list of circumstances, the ability to practice a vocation or avocation is dependent upon successful completion of a test administered by the Department of Natural Resources. The DNR also sanctions continuing education programs that must be attended to retain the ability to practice some vocations or avocations. These requirements are authorized by statute and typically implemented by rule.

Illustrative are the following:

- (1) To provide nuisance wild animal control services, an individual must obtain a permit and satisfy testing requirements under 312 IAC 9-10-11. The Division of Fish and Wildlife provides a written test “based on literature (reference material) that has been published on the subject, along with the applicable rule.” The division creates study packets and provides applicants with copies of the rules and packets, but not the test questions. To help evaluate the initial test, the division obtained feedback from experienced wild animal control operators, as well as from the division’s furbearer biologist and a conservation officer. A similar review is performed when the test is revised approximately every other year. As provided in the rule, a person has two opportunities to pass the test. Following a second failure, the person cannot again take the test for at least six months. If a person fails the test a second time by only one question, the division traditionally reviews the test to determine if a question is ambiguous. This license also has continuing education requirements
- (2) To provide wild animal rehabilitation, a person must obtain a permit and satisfy testing requirements under 312 IAC 9-10-9. The Division of Fish and Wildlife follows processes that are similar to those for a permit to provide nuisance wild animal control services, including continuing education requirements.
- (3) An individual must obtain a license under 312 IAC 9-10-13.1 to practice falconry and is required to satisfy testing requirements if not previously qualified as a general or master class license holder. The Division of Fish and Wildlife developed the test in cooperation with the Indiana Falconry Association. The U.S. Fish and Wildlife Service also reviewed and approved the examination. Continuing education requirements do not apply.¹
- (4) During the November 2011 meeting, the Natural Resources Commission gave final adoption to amendments to 312 IAC 11-13 to require both testing and continuing education for water well drilling contractors and for water well pump installers. 312 IAC 11-13 is administered by the Division of Water.

When in September 2010, the Commission gave preliminary adoption to rules that would establish testing and continuing education requirements for water well drilling contractors and water well pump installers, the IDEM representative asked whether the agency previously coordinated a continuing education program. She added, “One thing that we have encountered

¹ Linnea Petercheff, DNR Division of Fish and Wildlife (November 21, 2011 email).

with ours is that if you were to reject those credits that people like to have an opportunity to appeal the denial.”² During the November 2011 meeting, the Commission referred this subject to the Advisory Council for perspectives and advice.

The Indiana Professional Licensing Agency is responsible for testing and continuing education for several professions. The PLA provided a review structure used by California as a possible model. As provided in Title 16, Division 9 of the California CFR:

934. Examination Appeal

- (a) An applicant who has received a fail score on the written or practical examination shall be eligible to appeal to the board for a review of his or her examination results.
- (b) The appeal shall be filed with the board within fifteen (15) days after the date of notification of his or her examination results. The appeal shall be made in writing, and it shall state the reason for appeal. The board shall only consider appeals regarding significant procedural error in or adverse environmental conditions during the test administration.
- (c) The review of the appeal shall be conducted by one or more board members, or the board’s designee, to determine if there is clear and convincing evidence to sustain the applicant’s appeal. Such findings shall be subject to the approval of the board.
- (d) Within thirty (30) days after the board has approved the determination on appeal, the applicant shall be notified in writing of the results of his or her appeal. In acting on appeals, the board may take such action as it deems appropriate, including the issuance of a license where the board has determined that the applicant has demonstrated the required competence.³

The Advisory Council is requested to recommend language for preliminary adoption or to establish a process for crafting appropriate language. As a starting point for evaluation, and using the California regulation for general guidance, possible rule language is offered in Exhibit “A”. An alternative might be the consideration of a nonrule policy document instead of a rule. The subject does not bear the urgency attendant to some concepts, however, and the Advisory Council could instead direct additional discussion and consultation before identifying language for a particular rule or nonrule policy document.

² Martha Mettler Clark, IDEM Deputy Assistant Commissioner, from Minutes of Natural Resources Commission (September 21, 2001).

³ Chris Smith, DNR Legislative Liaison (November 18, 2011 email).

Exhibit “A”

Rule 5. Review of Determinations for Testing and Programs for Continuing Education

312 IAC 2-5-1 Applicability

Authority: IC 14-10-2-4; IC 25-39-4-9

Affected: IC 14; IC 25-39

Sec. 1. This rule applies to a department determination that:

(1) a person has failed a test; or

(2) the sponsor of a continuing education program has not satisfied minimum requirements for the department to sanction credit for the program;

if successful completion of the test or continuing education is required, by a statute or rule, for conduct of an activity licensed by the department. (*Natural Resources Commission; 312 IAC 2-5-1*)

312 IAC 2-5-2 Informal review of test failure by administering division

Authority: IC 14-10-2-4; IC 25-39-4-9

Affected: IC 14; IC 25-39

Sec. 2. (a) A license applicant that is notified of a fail score on a written or practical examination may seek informal review from the director of the division, or the division director's designate, of the examination results.

(b) An applicant must submit the request for informal review with the director of the division, or the division director's designate, within the earlier of:

(1) fifteen (15) days if notification of a fail score included the address of the person to whom the request must be directed and a statement the request must be made within fifteen (15) days of the notice; or

(2) ninety (90) days if the notification of a fail score did not include the information described in subdivision (1).

(c) The division shall conduct the review in an informal manner. If requested by the applicant, the division shall confer with the applicant at the division's office before deciding the informal review.

(d) The division director or the division director's designate may take any appropriate action, including retesting or the issuance of a license, if determining the fail score was the likely result of any of the following:

(1) A significant procedural error by the division.

(2) Adverse environmental conditions immediately preceding or during the test administration.

(3) Fundamental ambiguity on a test question that could be reasonably expected to cause an applicant to select an answer other than the one identified by the division as correct. (*Natural Resources Commission; 312 IAC 2-5-2*)

312 IAC 2-5-3 Informal review of administering division's division not to credit a continuing education program

Authority: IC 14-10-2-4; IC 25-39-4-9

Affected: IC 14; IC 25-39

Sec. 3. (a) The sponsor of a continuing education program or a license applicant who attends a continuing education program may seek informal review from the director of the division, or the division director's designate, of a decision by the division not to authorize credit or to authorize fewer credits than the sponsor or license applicant believes are appropriate.

(b) A sponsor or an applicant must submit the request for informal review with the division director, or the division director's designate, before the program is presented.

(c) The division shall conduct the review in an informal manner. If requested by the applicant, the division shall confer with the applicant at the division's office before deciding the informal review.

(d) The division director or the division director's designate may take any appropriate action, including approving credit or additional credits, if determining the continuing education program:

(1) includes information significant to the governing statute or rule that was not previously known to the division; or

(2) provides innovative or specialized instruction to a limited constituency, with extraordinary educational needs, and that is likely to enhance the interests protected or promoted by the governing statute or rule. (*Natural Resources Commission; 312 IAC 2-5-3*)

312 IAC 2-5-4 Administrative review

Authority: IC 14-10-2-4; IC 25-39-4-9

Affected: IC 14; IC 25-39

Sec. 4. (a) A division director or the division director's delegate shall notify a person in writing who seeks review under section 2 or section 3 of this rule, within thirty (30) days after completion of the review, of the division's decision.

(b) The notification provided under subsection (a) shall advise the recipient of the opportunity to seek administrative review of the division's decision, under IC 4-21.5 and 312 IAC 3-1, within eighteen (18) days of issuance of the notice. (*Natural Resources Commission; 312 IAC 2-5-4*)